



EYES ON THE ICC

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An interdisciplinary journal devoted to the study and analysis of the International Criminal Court.

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ORGANISATION FOR THE PROHIBITION OF CHEMICAL WEAPONS
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ABOUT THE COUNCIL FOR AMERICAN STUDENTS IN INTERNATIONAL NEGOTIATIONS (CASIN):

The Council for American Students in International Negotiations (CASIN), was originally founded as the Independent Student Coalition for the International Criminal Court (ISC-ICC) and is the only student-based organization in the United States dedicated to educating the American public about the Rome Statute and the International Criminal Court. The ISC-ICC began as a simple petition, signed by US college and university students across the country, asking then-President Clinton to allow the United States to become a signatory to the Rome Statute. The belief of this initial group of students in the value of a relationship between the US and the ICC, expressed through a simple petition, has since grown into an effective organization that plays an important role in fostering a positive relationship between America and the ICC in many ways.

CASIN represents the next generation of American leadership in the international arena, and has maintained a consistent presence at the ICC negotiations held at the United Nations. American students from across the country, referred to at the UN as “voices of the future,” participated in the preparatory negotiations for the Court through the auspices of the ISC-ICC. Representing the next generation of American leaders, CASIN has continued to participate in negotiations for the Court at meetings of the Assembly of States Parties, the governing body for the Court.

This journal encourages a dialogue between those studying and working with the International Criminal Court and the general public. This journal works to fulfill CASIN’s role as an educator and as a provider and presenter of the information necessary for individuals to arrive at their own, informed opinions and conclusions about the new Court.

The lack of awareness about the International Criminal Court in the United States is alarming. We hope that you, the reader, will join us in our efforts to educate the American public about the importance of the Court. Our goal is to keep the United States engaged in the work of the Court.

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FROM THE EDITOR:

Beneath the surface of high-profile prosecutions, the ICC continues to affect the international landscape in significant and unprecedented ways. If there is one theme that connects the articles in this volume, it is the study of the systemic effects of an international criminal tribunal upon areas unanticipated at the Rome Conference.

*Lisa Tabassi examines how the Organization for the Prohibition of Chemical Weapons (OPCW) might work with the ICC if an investigation targeted mutual concerns. Drawing upon the example of the International Committee of the Red Cross, Tabassi carefully lays out the risks and benefits of collaboration between such singular entities. Jeff LeBlanc argues that the United States' attempt to hold prisoners of war accountable under domestic instead of international law undercuts the international system and subjects U.S. servicemembers to further risks. By labeling foreign fighters as "enemy combatants," the U.S. enables the reciprocal treatment of its own troops, should they be captured on foreign soil. Nhu Vu analyses the effects of victims' rights movements on the rights of the accused—something that often receives less attention in post-conflict societies. She makes specific recommendations for protecting witnesses while maintaining due process of law at the ICC. Jacqueline Kiggundu brings a case study on Uganda to bear on women's human rights, and in the process she makes an incisive contribution to the study of complementarity. Kiggundu shows that the threat of ICC prosecution has spurred Uganda to overhaul its treatment of sexual violence against women. This has created dramatic changes in Ugandan law, but the results are not without problems. Our own Debbie Sharnak weighs in on the peace-versus-justice debate, using the Democratic Republic of Congo as a reference point. She argues that peace without justice is ultimately no peace at all—real peace can only come through justice. Finally, we are blessed with a review of Jason Ralph's *DEFENDING THE SOCIETY OF STATES*, by Lauren Redman. Redman traces Ralph's argument explaining U.S. opposition to the ICC as tied to a strong statist conception of world order.*

Judging from this volume's contributions, the ICC—and the larger issue of international criminal law—is at the center of remarkable developments in international law and international relations. My thanks go out to this volume's contributors, for helping us understand precisely what those developments are, and how they will shape our world in years to come.

Thanks are also due, of course, to our editorial staff and everyone at CASIN. To respond to an article or to inquire about upcoming changes to the journal, please contact me directly at ted@americanstudents.us. I would love to hear from you.

Cordially,



Ted Lechterman
November 2007

THE NEXUS BETWEEN THE INTERNATIONAL CRIMINAL COURT AND THE ORGANISATION FOR THE PROHIBITION OF CHEMICAL WEAPONS

*Lisa Tabassi**

Abstract. *Both headquartered in The Hague, the International Criminal Court (ICC) and the Organisation for the Prohibition of Chemical Weapons (OPCW) could coincide if the ICC is seized with a case involving the use of chemical weapons and an OPCW inspection team has investigated the event. Would the OPCW produce its inspection report as evidence and would it allow its inspectors to give testimony as witnesses, if called by the ICC, or could such evidence be compelled? In some key respects, the OPCW has certain similarities with the International Committee of the Red Cross (ICRC) which refused to produce evidence and allow the testimony of a former staff member in proceedings before the International Criminal Tribunal for the Former Yugoslavia. It argued, and the Court accepted, that the admission of such evidence for purposes other than those strictly foreseen in the ICRC mandate could jeopardise the ICRC's ability to perform its mandate and affect the safety of its personnel in the field. In such a scenario, the decision by the OPCW policy-making organs would be taken on the basis of practical and political considerations.*

I. INTRODUCTION

For three of its sessions now the Assembly of the States Parties of the International Criminal Court¹ (“ICC” or “Court”) has met in The Hague, the seat of the ICC. A number of the delegations of the Members of the Organisation for the Prohibition of Chemical Weapons (OPCW),² wearing their ICC hats, joined their national delegations to the ICC to participate in the decisions concerning the administration and management of the Court for the coming year.

The ICC is the newest international organisation to be seated in The Hague and one which, along with the OPCW, also has a specific treaty-based mandate concerning chemical weapons. One might wonder where these two institutions and their constituent treaties (the Rome Statute and the Chemical Weapons Convention) intersect, as international organisations, and in terms of national implementation by their respective States Parties. Since well over half of CWC States Parties have become party to the Rome Statute,³ that question bears scrutiny. The present comment examines the matter in brief.

* Legal Officer, Provisional Technical Secretariat of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBT/O). For 14 years previously, the author respectively served in Technical Secretariat of the Organisation for the Prohibition of Chemical Weapons and its predecessor Preparatory Commission. The views expressed are the author's own and cannot otherwise be attributed. A previous version of this article appeared in *Harvard Sussex Program on Chemical and Biological Weapons, CBW CONVENTIONS BULLETIN*, issue no. 75 (March 2007), 1, 7-12.

¹ Established on 1 July 2002 upon entry into force of the Rome Statute of the International Criminal Court (“Rome Statute”). As of 1 January 2007, there are 104 parties to the Rome Statute. The text, as corrected, is available at www.icc-cpi.int.

² The OPCW was established on 29 April 1997 upon entry into force of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (CWC). As of 1 July 2007, there are 182 parties to the CWC. The text, as corrected and amended, is available at www.opcw.org.

³ Of the 104 States Parties to the Rome Statute, 102 are States Parties to the CWC. The following 80 CWC States Parties have *not* become party to the Rome Statute: Algeria, Armenia, Azerbaijan, Bahrain, Bangladesh, Belarus, Bhutan, Brunei Darussalam, Cameroon, Cape Verde, Chile, China, Cook Islands, Côte d'Ivoire, Cuba, Czech Republic, El Salvador, Equatorial Guinea, Eritrea, Ethiopia, Grenada, Guatemala, Haiti, Holy See, India, Indonesia, Iran (Islamic Republic of), Jamaica, Japan, Kazakhstan, Kiribati, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Libyan Arab Jamahiriya,

VICTIMS OF CONVENIENCE: HOW REDEFINING COMBATANT STATUS ENDANGERS U.S. SOLDIERS

*Jeff W. LeBlanc**

“The treatment of prisoners of war and of the civilian population of occupied areas is the most certain measure and index of the civilization of a people and of a nation.”—Pope Pius XII¹

I. INTRODUCTION

Following the terrorist attacks of September 11, 2001, the Bush administration launched what has become known as the Global War on Terror. In the ongoing fight against terrorism, the United States has reinterpreted some of its existing international treaty obligations to meet the shifting demands of the War on Terrorism’s fluid battlefields. Of particular significance is the US’s new relationship to the 1949 Third Geneva Convention Relative to the Treatment of Prisoners of War.² The Bush Administration has reinterpreted how a combatant is defined in regards to the application of Prisoner of War status under the Third Geneva Convention. Prior to this new reading of what constitutes a combatant, combatants were granted Prisoner of War status under the Third Geneva Convention by virtue of membership in the armed forces of a High Contracting Party to the Conventions.³ Prisoner of War status ensures that the prisoners are not tortured and that they receive the basic necessities. However, the Bush Administration has restricted how individuals captured by US forces can acquire Prisoner of War status. This paper shall demonstrate that this reinterpretation is shortsighted, dangerous, and jeopardizes the safety of United States military personnel by providing future enemies with precedent for denying US military personnel Prisoner of War status and protections. By restricting Prisoner of War status beyond conventionally accepted parameters, the United States risks having its own servicemen and women exposed to increased danger if apprehended by the enemy since captured US military personnel may fail to qualify as Prisoners of War under the US’s own new interpretation. For example, if US soldiers were out of uniform or concealing weaponry, they could theoretically find themselves labeled “unlawful enemy combatants” for failing to meet combatant definitional criteria, subjecting them to their enemy without POW status.

The international treaties that are supposed to legally define POW status and other guidelines for war include the Geneva Conventions of 1949 and their Additional Protocols of 1977.⁴ While it may seem surprising that an activity as destructive and disruptive as war is governed by law, this concept is almost universally accepted. War has been subject to certain norms, legal and otherwise for much of human history. Societies around the world have seen war as a necessary or even normal state of affairs, while simultaneously recognizing the

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¹ HOWARD S. LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT (1977).

² Third Geneva Convention Relative to the Treatment of Prisoners of War, 12 Aug. 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

³ Telephone Interview with Major Sean Watts, Professor, International and Operational Law Department, The Judge Advocate General’s Legal Center and School, in Charlottesville, Virginia (19 Mar. 2007).

⁴ See generally First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 Aug. 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Second Geneva Convention for the Amelioration of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 Aug. 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Third Geneva Convention Relative to the Treatment of Prisoners of War, 12 Aug. 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

THE NECESSITY OF MAINTAINING PROTECTIVE MEASURES IN BALANCING THE RIGHTS OF VICTIMS AND THE ACCUSED

*Nhu B. Vu**

Lady Justice holds in her left hand a scale in which she weighs evidence in favor of and against the accused, blindfolded so that she is not improperly influenced by appearances. In her right hand she holds a sword indicating the power associated with her decisions. Amongst her difficult responsibilities include the balancing of rights of the accused against the rights of victims. This task becomes particularly challenging in a setting of emerging international justice. The International Criminal Tribunal for the former Yugoslavia (ICTY) was only recently established in 1993, and the International Criminal Court (ICC), the first permanent criminal court for the world, only came into force in 2002. These courts have been established to try suspects of the most atrocious crimes, to avenge the victims of such crimes, and to prevent future occurrences. The need to ensure the legitimacy of these emerging courts is of the utmost importance, and the legitimacy of these courts is substantially derived from due process being guaranteed to defendants.

In bringing forth these trials for crimes against humanity, war crimes, genocide, and aggression, these courts must rely heavily on eyewitness testimony. The need for eyewitness testimony can be seen from the numbers of witnesses testifying in trials. For example, within one year, from 2000 to 2001, the ICTY handled over 550 witnesses from thirty different countries for eight trials. For the Srebrenica genocide case involving only one defendant, 103 prosecution witnesses, 12 defense witnesses, and two Chamber witnesses were called over a 98-day trial.¹ Indeed, in some instances, there can be so little evidence of a crime that the most important proof of the crime is eyewitness testimony. In the trial of General Radislav Krstic, “the massacres were so effective that only one or two victims survived.”² Other times, there may be no survivors, as was the case with an alleged incident in which hundreds of bodies of executed Muslims were dumped into a river.³ The majority of witnesses are victims who have suffered under extraordinary circumstances. Public hearings of these stories are crucial in order to prove such grave crimes.

In light of the need for eyewitness testimony, the ICTY and the ICC have included provisions in their statutes and rules identifying protective measures that should be taken to ensure eyewitness testimony. Both courts have also taken measures to ensure that witnesses are not interfered with. Unfortunately, the difficulties in ensuring safety for witnesses, the problems encountered with trying to punish those who interfere with witnesses, as well as the inability to compel witness testimony, are problems that continue at both courts. The first section of this paper will analyze these issues related to ensuring eyewitness testimony and how mechanisms to enforce the courts’ will remain weak at both the ICTY and the ICC. These issues are fundamental to understanding protective measures taken by both courts. The second section will assess whether certain protective measures such as closed sessions and complete anonymity are prejudicial to the accused. Despite criticisms to the contrary, the paper concludes that closed sessions and the more extreme tactic of granting anonymity are measures that should be preserved for extraordinary circumstances at both the ICTY and the ICC.

* NHU B. VU, JD (Boston College School of Law, expected 2008), completed an internship at the International Criminal Tribunal for the former Yugoslavia (ICTY) in May 2007.

¹ Patricia Wald, *Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal*, 5 YALE HUM. RTS. & DEV. L.J. 217, 219 (2002).

² *Id.*

³ *Id.*

HOW CAN THE INTERNATIONAL CRIMINAL COURT INFLUENCE NATIONAL DISCOURSE ON SEXUAL VIOLENCE? EARLY INTIMATIONS FROM UGANDA

*Jacqueline Kiggundu**

This paper explores the International Criminal Court's (ICC) potential to positively influence Uganda's discourse on sexual violence against girls and women (SVAW). This research is in line with the principle of complementarity which holds that the ICC will foster domestic enforcement of human rights in its States Parties.¹ Using a critical feminist lens, I contrast Uganda's treatment of sexual violence to related jurisprudence developed at the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the Former Yugoslavia (ICTY), and in the Rome Statute of the ICC. Next, I examine NGO documents and unstructured interview data to determine the nature of Uganda's current discourse on sexual violence. My analysis reveals women's human rights advocates are using the momentum provided by the ICC to articulate five distinct concerns: (1) the ICC's failure to account for all perpetrators of SVAW, (2) inadequacies of Uganda's legal approach to SVAW, (3) objections to Uganda's social responses to SVAW, (4) shortcomings within Uganda's traditional justice responses to SVAW, and (5) the failure to mandate the provision of compensation to victims of SVAW. In congruence with critical feminist theory, this paper centralizes the experiences of women and girls in Uganda and considers SVAW to be a critical women's human rights issue.

I. INTRODUCTION

Since the 1990s, the elimination of violence against women (VAW) has maintained a place on the international political agenda. The Vienna (1993) and Beijing (1995) declarations are but two examples of the decade's renewed emphasis on the rights enshrined in the Convention on the Elimination of Discrimination Against Women (CEDAW) and the fight against VAW. A testament to this success is the Rome Statute of the International Criminal Court's inclusion of crimes of sexual violence as a war crime and a crime against humanity.² This is particularly significant for women's human rights advocates in the Statute's State Parties seeking to eradicate all forms of sexual violence against women and girls (SVAW). Indeed, precedents set in international law can act as an advocacy tool for those seeking to change domestic practices surrounding human rights abuses.³

In this way, the ICC's indictment of members of the Lord's Resistance Army (LRA) for crimes of sexual violence can influence debate on sexual violence within Uganda. Space has opened for women's human rights advocates to compare the jurisprudence established in international law with Uganda's current laws and practices on SVAW. This paper will sketch out this comparison and will look to women's human rights advocates in Uganda for early intimations of advocacy for the revision of current laws and practices associated with this crime.

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¹ Jamie Mayerfeld, *Who Shall be Judge?: The United States, The International Criminal Court and the Global Enforcement of Human Rights*, 25 HUM. RTS Q. 93, 103 (2003); Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EJIL 144, 156 (1999).

² GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY 393, 436 (2006). In international law, sexual violence constitutes a crime against humanity when the act is carried out to fulfil a political objective and a war crime when armed forces target civilians as part of policy or to demoralize the community.

³ STEVEN RATNER AND JASON ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY, 2ND EDITION, 182 (2001).

REVIEW ARTICLE

JUSTICE AND MORAL RESPONSIBILITY IN THE CONGO

*Debbie Sharnak**

I. INTRODUCTION

On April 19, 2004, just two years after the Rome Statute was ratified to create the International Criminal Court (ICC), the Democratic Republic of Congo (DRC) referred the first case to the newly established Court to investigate crimes that were committed anywhere within its country's borders. Now, three years later, the result of the investigation has led to a case against Thomas Lubanga Dyilo for recruiting and conscripting child soldiers. This case is being watched closely around the world, for with over 100 states as signatories to the Rome Statute, many view the Court as the greatest indicator of an emerging norm in the international community to put an end to impunity for the worst crimes against humanity. This is in step with an increasing amount of initiatives that seek to establish a commitment to justice over impunity such as the 1999 UN Guidelines for Mediators, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights.

While these treaties were a step in the right direction, a permanent international body to prosecute the worst offenders of the most heinous crimes was deemed an essential part of advancing this goal—but not because those establishing the Court believed that prosecutions would necessarily deter or prevent future occurrences. In fact, prosecutions should not be understood as a means to restore complete order, to ensure that no further violations will occur, or to make up for the losses that society has incurred. Rather, the importance of prosecutions lies within the fact that they recognize that all citizens are equal rights holders under the law and equally worthy of protection, regardless of gender, ethnicity, or socio-economic status. In a transitional justice framework, where the goal is to create a peaceful and stable post-conflict society, prosecutions become a complementary mechanism for countries to address their violent pasts, recognize that all citizens are valuable within this new system, and inculcate trust in emerging institutions to create a society that will not fall back into a pattern of violence. The ICC becomes a fundamental tool in advancing these goals because in societies that are unable or unwilling to prosecute the worst offenders, the Court can provide an alternative way to ensure that at a basic level, there is a vindication of human rights.

The case against Lubanga provides an important test case for the implementation of these ideas, as he is being accused by the Court of enlisting and conscripting children under the age of 15 and using them to participate actively in hostilities, which is in direct violation of article 259(3)(a) of the Rome Statute.¹ The crime of recruiting and conscripting children, considering their particular vulnerability, is viewed by the international community as one of the worst crimes against humanity.

On January 29, 2007, The Hague Pre-Trial Chamber I confirmed the charges against Lubanga to send the case against him to trial in the first indictment of the ICC. It will be awhile before it is evident whether the Court can ultimately make any headway toward its goal of achieving justice in the international community; yet, the larger issues that this case

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¹ *Arrest Warrant for Thomas Lubanga*, International Criminal Court, http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-2_tEnglish.pdf (accessed 5 Nov. 2006).

BOOK REVIEW

Lauren Fielder Redman*

JASON RALPH

Defending the Society of States: Why America Opposes the International Criminal Court and its Vision of World Society (Oxford, 2007)

Jason Ralph's *Defending the Society of States* is an important addition to the body of literature on the International Criminal Court. Ralph's work is a weighty intervention into the debate over the appropriateness of the United States' opposition to the ICC because it examines the issue from an international relations perspective. Ralph's work thus joins the sparse but growing body of interdisciplinary scholarship on the ICC. What makes this book so valuable is that it contributes to an understanding of what really drives US opposition to the ICC.

Defending the Society of States has two major features. First, Ralph claims that the Rome Statute of the International Criminal Court helps constitute world society by creating an institution and a court "that respond to a universal interest in prosecuting individuals who commit crimes against universal values...even when the society of states is unwilling or unable to do so" (21). The second element of this work is Ralph's analysis of U.S. opposition to the ICC through the lens of the Court's impact on world society. Specifically, the book uses the English School of international relations to explore this problem. Ralph views the problem through the lens of the English School because of its strong normative focus and the centrality of international law in its formulation of international society.

Ralph introduces the idea that the ICC has the potential to bring about a sea change in international society. In Ralph's opinion, "international society is made up of a set of constitutive rules," which can be equated to international law *ius cogens* norms (29). Ralph points out that while the US supports democracy, it does not support a democratization of international law. This is evident in the US position that international law is based on consent rather than consensus. Ralph supports this claim by thoroughly exploring the role of positivism in international law, and questioning its validity. Positivism, according to Ralph, defends the privileges that the powerful have in society.

The argument is carried further by a look at the alternatives to the ICC and their shortfalls. Ralph acknowledges a near universal agreement that inhumane behavior must not go unpunished. The major disagreement lies in finding agreement on the appropriate forum for punishment. Two alternatives to the ICC are ad hoc tribunals and universal jurisdiction. Ralph considers ad hoc tribunals as flawed because they are ferociously expensive, lack deterrent power, and require reinventing the wheel with each new tribunal. Universal jurisdiction carries its own set of difficulties as the *ex parte* Pinochet case and the Arrest Warrant case summarized in the text demonstrate. Ralph points out that "justice was dependent on states using their national courts, or on the U.N. Security Council setting up international courts, in order to sustain a global conscience that valued humanity...[I]t lacked the institution of criminal justice to help maintain societal cohesion when its core value (i.e. humanity) was so obviously violated" (89). Ralph suggests that the problem with both of these forms of justice is that they are selective, and selective justice carries profound costs for society.

Ralph moves from the inadequacies of alternatives to the ICC to a description of the workings of the ICC. He shows that criminal justice adds to the institutional depth of society, stating that the ICC identifies the form society should take by codifying fundamental principles, and structures social processes that help construct and reaffirm common val-

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